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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

TEXACO PUERTO RICO INC.,

Petitioner,

v.

JUSTINO V. ARMAIZ and his wife JOAQUINA GONZALEZ, and MOBIL OIL CARIBE, INC.,

Respondents.

PETITION FOR WRITS OF CERTIORARI.

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Petitioner,

v.

JUSTINO V. ARMAIZ and his wife JOAQUINA GONZALEZ, and MOBIL OIL CARIBE, INC.,

Respondents.

PETITION FOR WRITS OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that writs of certiorari issue to review the judgment of the Supreme Court of Puerto Rico and the judgment of the Superior Court of Puerto Rico, Bayamon Part.

This petition raises for decision the scope of a major policy of the Court: the policy barring private litigants in contract actions from pleading the "very dishonest" defense of illegality under federal antitrust laws. The Court has thus far permitted only one exception to this rule: where the contract sued upon is "intrinsically illegal" and the judgment sought would itself enforce "the precise conduct made unlawful by the Act."

The policy is no mere technicality of the antitrust laws. It is of vital national importance, both in terms of efficient antitrust enforcement and in keeping contract actions, particularly those in the state courts, from inevitably being dragged into the antitrust labyrinth.

The decision below runs squarely counter to this Court's policy, to the decisions which established that policy and to the intent of Congress, which refused to authorize the defense as a remedy. It does so in a fact situation of particular commercial importance.

Opinion Below.

The opinion of the Superior Court of Puerto Rico, Bayamon Part—the only court rendering any opinion in this cause—is printed as Appendix A hereto[1] (44-49).[2]

The Supreme Court of Puerto Rico rendered no opinion in declining to review the judgment of the Bayamon Superior Court.

Jurisdiction.

The judgment of the Superior Court is dated and was entered on August 11, 1961, and is printed as Appendix B hereto (58-59). The judgment of the Supreme Court of Puerto Rico declining to review the decision of the Bayamon Superior Court is dated and was entered on October 16, 1961, and is printed as Appendix C hereto (81).

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[1] The original opinion is in Spanish, as are all other papers in this action; the appended opinion is the translation certified by the Supreme Court of Puerto Rico. All other references herein are to the certified typewritten translations of the court papers before the Supreme Court of Puerto Rico.

[2] All numerical references herein are to the pages of such typewritten translations.

The jurisdiction of this Court is invoked under 28 U. S. C. §1258.

Petitioner seeks certiorari to both the Bayamon Superior Court and the Supreme Court of Puerto Rico because of the uncertainty as to the application of Section 1258, a section which became effective on August 30, 1961 and which has not yet been the subject of judicial construction. The jurisdictional questions raised by this statute are discussed at pages 8-18, *infra*.

Questions Presented.

1. Does Section 1258 of the Judicial Code preclude the Court from a plenary review of federal questions determined by the lower courts of Puerto Rico where the Supreme Court of Puerto Rico, in the exercise of its discretion, declines to review the judgments of such lower courts?

2. This Court, in a long series of decisions, has repeatedly barred the defense of antitrust illegality except where the contract sued upon was "intrinsically illegal" and the judgment sought would enforce "the precise conduct made unlawful by the Act."

May a lower court, in the teeth of this policy, permit defendants in a contract action to evade their contractual obligations by interposing such defense where:

(a) the contract is clearly not "intrinsically illegal";

(b) the legality or illegality of the contract could not be determined from the contract itself or even from the course of dealings of the parties, but would require an extensive inquiry into contracts with third persons, analysis of market data, and other complex factual explorations;

(c) the precise provision sued upon—a right of first option—was not merely compatible with the anti-trust laws, but was expressly found by the court below to be valid in itself.

Statutes Involved.

The statutes pertinent to this petition are Sections 1, 2 and 3 of the Sherman Act, 15 U. S. C. §§1, 2 and 3; Section 3 of the Clayton Act, 15 U. S. C. §14; Sections 1257 and 1258 of the Judicial Code, 28 U. S. C. §§1257, 1258; and Laws, Puerto Rico Ann., Title 4, Section 37 (1959 Cum. Supp.).

These statutes are printed as Appendix E hereto.

Statement.

Petitioner Texaco Puerto Rico Inc. ("Texaco"), a wholly-owned subsidiary of Texaco Inc., is a Puerto Rico corporation engaged, among other things, in the marketing of Texaco gasoline in Puerto Rico. Defendant Mobil Oil Caribe Inc. ("Mobil"), a wholly-owned subsidiary of Socony Mobil Oil Co., is a Panama corporation engaged, among other things, in the marketing of Mobil gasoline in Puerto Rico. Defendants Armaiz and his wife, Joaquina González (hereinafter jointly referred to as "Armaiz") are the owners of a service station in Puerto Rico.

The gist of the complaint is that Mobil induced Armaiz to violate his contract with Texaco and to purport to enter into a lease of his service station to Mobil, while his contract with Texaco was still in full effect and without according Texaco the first option on such lease, as required by the contract. The complaint seeks an injunction and cancellation of Mobil's lease with Armaiz.

The Contract with Armaiz.

Armaiz was originally set up as a service station owner in a three-way contract, dated June 14, 1954, among (1) the then owners of the service station (Rosa), (2) Armaiz and (3) Texaco's predecessor in interest, Trinidad Leaseholds (Puerto Rico), Inc. ("Trinidad"), an independent gasoline marketing company (9-15).

Under the agreement, Rosa sold the station to Armaiz for $15,000; Trinidad advanced this sum to Armaiz, and Armaiz granted Trinidad a mortgage on the service station as security for the loan, to be repaid over a ten-year period, with 4% interest. In addition to the usual terms as to security, insurance, etc., the contract expressly recited that Trinidad was lending the money to Armaiz on the understanding that Armaiz would retain possession of the station for ten years, *i.e.*, during the term of the loan (13). Armaiz agreed that he would not dispose of the station during that period without Trinidad's consent and without giving Trinidad a first option to purchase or lease the service station if it so desired: *Ibid.* It is by reason of Armaiz' unabashed breach of this clause that this action was brought.

Armaiz further agreed that, while the debt to Trinidad remained outstanding he would not sell any gasoline other than "Regent" (Trinidad's brand) (12-13) and that he would use the station only for that purpose and for selling other products "usually sold in gasoline stations in Puerto Rico" and the operation of a bar-restaurant business, such activities to be continued in the same proportion as then obtained. *Ibid.*

On July 28, 1955, Trinidad loaned Armaiz an additional $5,000, and the payment period, together with the other terms of the contract, was extended to fifteen years (15-21).

Some three years later, on June 30, 1958, Trinidad assigned to Texaco all its rights under the above contract (24).

The Breach of the Contract.

On January 28, 1960, while Texaco's contract with Armaiz was still in full effect, Mobil induced Armaiz to break the contract and purported to enter into an agreement for the lease of the service station for ten years, beginning April 1, 1960 (24-25). Armaiz entered into this agreement without offering Texaco the first option on such lease, as required by the contract. *Ibid.*

On May 2, 1960, Texaco filed its complaint, based upon Armaiz' violation of his contractual obligation to accord Texaco such first option and on Mobil's role in inducing him so to act.

In their joint answer, the defendants denied, or denied knowledge of, substantially all the allegations of the complaint, except the fact that Armaiz had purported to enter into an agreement with Mobil (28-29). In addition, defendants purported to set up nine affirmative defenses (29-31). Four of these defenses—Nos. 1, 2, 6 and 7—sought to raise the defense that the contract between Texaco and Armaiz was illegal under the federal antitrust laws. These defenses did not claim, nor did defendants thereafter claim, that the option clause as such was illegal. The purported defenses are printed as Appendix D hereto. (*Ibid;* see also 62-63). The opinion of the Superior Court expressly considered and determined the federal question raised by the defenses.[3] See Appendix A hereto.

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[3] The effect of illegality under a federal statute is, of course, itself a question of federal law. *Kelly* v. *Kosuga*, 358 U. S. 516, 519 (1959).

Defendants also served Texaco with extensive interrogatories predicated on the supposed antitrust defenses, demanding disclosure of the details of Texaco's contracts with all service stations distributing Texaco products in Puerto Rico, the products sold by such stations, the similarities and differences between such contracts and the contract with defendant Armaiz, the volume of Texaco's sales in gallons and in money, broken down according to sales for resale and sales to end-users; Texaco's sales to "tax-exempt entities", to United States Government agencies, to the Government of Puerto Rico, and "each one of the Agencies" thereof, to all municipalities; the furnishing of equipment to service stations, etc. (32-38).

Texaco moved to strike the affirmative antitrust defenses, on the ground that the claim of antitrust illegality could not properly be interposed as a defense to the contractual provision sued upon (38-40). It also objected to the interrogatories on the ground, among others, that the only basis on which they were predicated—the antitrust defenses—was improper as a matter of law (40-44).

On April 12, 1961, the Superior Court, Bayamon Part, *while expressly finding that the option clause sued on was itself valid*, denied Texaco's motion to strike. In so doing, the court relied upon, and purported to follow, this Court's rulings in *Kelly* v. *Kosuga*, *supra*, *Cincinnati P. B. S. & P. Packet Co.* v. *Bay*, 200 U. S. 179 (1906) and *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909). (46-47).[4] The defenses having been upheld, the

[4] While the defenses raised the question of illegality under both federal and local antitrust laws, the issue here presented was briefed and argued by both sides to the lower court entirely on the basis of the federal judicial authorities. The lower court reached its conclusion on the basis of federal law and made no independent determination under local law (which it viewed as "equivalent" to the federal law). See, *e. g. Grayson* v. *Harris*, 267 U. S. 352, 358

court further ordered that the voluminous interrogatories predicated upon the defenses be answered (44-49). On Texaco's respectfully declining to do so and on defendants' motion (56-57), the Court thereafter, on August 11, 1961, dismissed the complaint, with costs, and entered final judgment in favor of the defendants (58-59).

Plaintiff's petition for review in the Supreme Court of Puerto Rico was denied by that Court on October 16, 1961 (81).

The Threshold Jurisdictional Question.

Effective August 30, 1961, Congress repealed Section 1293 of the Judicial Code and enacted a new Section 1258, eliminating the appellate jurisdiction of the Court of Appeals for the First Circuit over the local Puerto Rican courts and transferring to this Court the power of direct review of federal-question cases decided in these courts.

Section 1258 parallels Section 1257 (Supreme Court review of state court decisions) with one major exception. Section 1257 provides for this Court's review of judgments rendered "by the highest court of a State in which a decision could be had." Section 1258, however, speaks of review of judgments rendered "by the Supreme Court of the Commonwealth of Puerto Rico."

Under the language of Section 1257, where the highest court of a state refuses to review the decision of an inferior

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(1925); *St. Louis, Iron Mountain & Southern Ry. v. McWhirter*, 229 U. S. 265, 267 (1913). The court made a single reference to local antitrust law, but it is apparent that its reasoning as to the propriety of the defense was wholly controlled by its view of federal law and that it "did not declare its independence of the decisions of this Court." See *Minnesota v. National Tea Co.*, 309 U. S. 551, 556 (1940); *Standard Oil Co. of California v. Johnson*, 316 U. S. 481 (1942); *State Tax Commission of Utah v. Van Cott*, 306 U. S. 511 (1939).

state court, or where such a decision is under state law non-reviewable, certiorari then runs to the inferior court as "the highest court . . . in which a decision could be had"; this Court is, therefore, assured of an opportunity for plenary federal review of any state decision erroneously adjudicating questions of federal law.[5]

It is readily apparent that this language of Section 1258 could be read literally to strip this Court of jurisdiction to review decisions of inferior courts of Puerto Rico and, where the Supreme Court of Puerto Rico had declined to review such a decision, to limit this Court's power to the determination whether the Supreme Court of Puerto Rico had acted properly in so refusing. Taking into account the numerous intangibles not of record (such as the state of the court docket) which enter into such a determination, such a reading would effectively deprive not merely this Court but the entire federal court system of any corrective power over erroneous adjudications of federal questions by inferior Puerto Rican courts, wherever the Puerto Rico Supreme Court had exercised its discretionary power and failed to review.[6] The inferior Puerto Rican courts would thus become the final arbiter of the most intricate questions of federal policy—a distinction which they alone would possess among all state and federal courts.

Such a result would be totally disruptive of any orderly system of appellate review of federal questions. It would

[5] *See, e.g., Sam Thompson v. City of Louisville*, 362 U. S. 199 (1960) (reversal, on certiorari, of judgment of Police Court of Louisville, Kentucky). If the equivalent case had arisen in Puerto Rico, this Court (if Section 1258 were read restrictively) would be powerless to grant review.

[6] For comment on the impossibility of assessing the factors entering into a refusal to review, *see Brown v. Allen*, 344 U. S. 443, 556 n. 1 (1953) (dissenting opinion).

also render the statute of doubtful constitutionality, confronting the Court with a complex constitutional issue: the extent of Congress' power to oust this Court of appellate jurisdiction. See *Kentucky* v. *Powers*, 201 U. S. 1, 37-39 (1906); Hart and Wechsler, *The Federal Courts and the Federal System*, 312-13 (1953); Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960).[7]

Obviously, such a result should not be judicially mandated absent an unmistakable Congressional intent. Fortunately, the legislative record is clear beyond peradventure that the Congressional intent was directly to the contrary and that the actual intent of Section 1258 was to place Puerto Rico on precisely the same footing as are the several states under Section 1257.

The Congressional Intent to Equate Puerto Rico with the Several States in Terms of Federal Review.

Puerto Rico achieved commonwealth status in 1950 under the Act of Compact. 48 U. S. C. §§ 731b-731e. Thereafter, it was frequently noted that it was anomalous not to have judgments of the Puerto Rican courts directly reviewable by the Supreme Court, as were judgments of state courts, without the intermediary of a court of appeals.[8]

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[7] This Court has noted, in rejecting "the tyranny of literalness" and giving "a rational content" to a statute, the fact that a different meaning "for what appear to be plain words" may be indicated by "the Act as a whole, by the persuasive gloss of legislative history, or by the rule of constitutional adjudication" to avoid a meaning which "would generate constitutional doubts." *United States* v. *Witkovich*, 353 U. S. 194, 199 (1957) (construing broad language restrictively on these bases).

[8] See *Figueroa* v. *Puerto Rico*, 232 F. 2d 615, 618 (1st Cir. 1956); Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 18-19 (1953). A bill which sought to achieve this result was introduced as early as 1951. H. R. 3232, 82nd Cong., 1st Sess. (1951).

—The 1957 Bill, H. R. 6009.

In 1957, the 85th Congress considered a bill, H. R. 6009, closely similar to the bill which ultimately became Section 1258. The Judicial Conference formally approved this bill. (Annual Report of Proceedings of Judicial Conference 40 (1957)).

In approving, the Judicial Conference noted that judgments of the Puerto Rico Supreme Court were, under the proposed statute, to be reviewable in the same way as judgments of the supreme courts of other states—a statement at the time not only literally correct, but completely correct in substance. It was, however, to be cited again and again in subsequent years, under circumstances which rendered it less appropriate.

Less than a year later, on June 26, 1958, the Puerto Rico Legislature adopted a discretionary-review procedure under which its own Supreme Court could decline to review judgments of the lower courts, other than those involving substantial constitutional questions and certain criminal cases. Laws, Puerto Rico Ann., Title 4, § 37 (Cum. Supp. 1959). The jurisdictional quirk in Section 1258 stems from this local law and from the failure of Congress to recognize the effect this altered procedure might have on the proposed jurisdiction of the Supreme Court of the United States.

Legislative hearings were held on H. R. 6009 in November, 1958. While the new discretionary review powers of the Puerto Rico Supreme Court were mentioned in passing in the course of the hearings,[9] they were discussed without the slightest awareness that they could have any possible effect on the content of H. R. 6009. It is apparent from the

[9] See, *e.g.*, Hearings Before Special Subcommittee, House Judiciary Committee, on H. R. 6009, 85th Cong., 2d Sess., ser. 24 (1958) ("Hearings") at 21, 35.

hearings that the participants, including the sponsor of the bill (the Resident Commissioner of Puerto Rico), other witnesses, and the members of the Subcommittee itself, simply took for granted that the effect of the proposed legislation would be to place Puerto Rico in a position identical to that of the several states, insofar as United States Supreme Court review of its court decisions was concerned. Statements to this effect constantly recur in the hearings.[10]

Despite the activity in its behalf, H. R. 6009 never reached the House floor for vote.

—The 1959 Bills.

In 1959, the Legislature of Puerto Rico, in its Joint Resolution No. 2, urged Congress to give the United States Supreme Court power to review decisions of the Supreme Court of Puerto Rico "in the same manner as are the judgments of the State supreme courts." See 105 Cong. Rec. 5269.

In response to this request, bills were introduced in both houses to amend the Compact between the people of Puerto Rico and the United States to add language to this effect. S. 2023, H. R. 5926, 86th Cong., 1st Sess. Both bills were then withdrawn for reasons unrelated to the question here involved.[11]

Later in the same session, new bills were introduced in both houses of Congress. S. 2708; H. R. 9234. These new bills, however, were framed in the language of Section 1257:

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[10] See, *e.g.*, Representative (now Senator) Keating: "... I can see no reason why the Commonwealth of Puerto Rico should not be treated in this regard the same as one of the 48 States—49." Hearings, p. 5. Benjamin Ortiz (a former Associate Justice of the Supreme Court of Puerto Rico): "[T]he effect of the bill is to create equality with the States as to the judicial review ..." *Id.* at 20.

[11] See Hearings Before the Special Subcommittee on Territorial and Insular Affairs, House Committee on Interior and Insular Affairs, 86th Cong., 1st Sess., ser. 14, at 10-14 (1960).

"ARTICLE XIV.

"Final judgments or decrees rendered *by the highest court of the Commonwealth of Puerto Rico in which a decision could be had* shall be subject to review by the Supreme Court of the United States in like manner as judgments and decrees of the courts of the several States." (emphasis supplied).

Had the bills passed in this form, the problem created by the 1958 Puerto Rico discretionary review law would have been cancelled out.

In approving these bills, the Judicial Conference used language virtually identical to that used by it with respect to the entirely different 1957 bill:

> "Article XIV provides that the final judgments of the highest court of Puerto Rico shall be subject to review by the Supreme Court of the United States in like manner as the decisions of the highest[12] courts of the several states of the Union, rather than by the Court of Appeals for the First Circuit as at present." Annual Report of Proceedings of Judicial Conference 12 (1959).

These bills, too, failed to reach the floor of either house.

—The Bill Which Became Section 1258.

In 1961, the Judicial Conference submitted to Congress a draft of the bill which was to become Section 1258. This bill reverted to the language of the original 1957 bill.

Again it is notable that all concerned—including Congress and the Judicial Conference—viewed the 1961 bill as

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[12] In its 1957 report, the Judicial Conference had used the phrase "supreme courts." Conceivably it viewed the change in the statutory phrasing as necessary only to cover the case of states, such as New York, where the "supreme court" is an inferior court and the "highest court" is called by another name.

identical in effect to the 1959 bills which authorized review, not merely of the judgments of the Supreme Court of Puerto Rico, but of the highest court in which a decision could be had.

In the Judicial Conference's letter of transmittal, it was stated:

> "This legislation was first considered by the Judicial Conference at its September 1957 meeting when it approved the provisions of H. R. 6009 of the 85th Congress. The Conference reiterated its approval in September 1959 when it recommended the passage of identical 86th Congress bills, H. R. 9234 and S. 2708. These bills provided for several amendments to the compact between the people of Puerto Rico and the United States, article XIV relating to the review of final judgments of the *Supreme Court of Puerto Rico.*"[13] H. R. Rep. No. 683, 87th Cong., 1st Sess., July 10, 1961, p. 3. (emphasis supplied).

Similarly, the House Report on the bill treated the proposals as the same.

> "This proposal was recommended by the Judicial Conference of the United States first in 1957 in the 85th Congress and again in the 86th Congress. A special subcommittee of the Committee on the Judiciary held hearings on a similar proposal in the Commonwealth of Puerto Rico in 1958. The Judicial Conference in a letter to the Speaker, dated May 8, 1961, renewed its recommendations for the enactment of this bill." *Id.* at 2-3.

The Senate Report was to the same effect. S. Rep. 735, 87th Cong., 1st Sess. 2-3 (1961).

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[13] The bills actually authorized review of judgments "of the highest court of the Commonwealth of Puerto Rico in which a decision could be had."

In the entire legislative record, only one reference is made to the possible effect of the difference in language between H. R. 7038 and Section 1257. This reference appeared in a letter from the Deputy Attorney General to the Chairman of the House Judiciary Committee, dated July 10, 1961. The Deputy Attorney General there stated, somewhat cryptically:

> "It is suggested that it might be advisable to consider amending the bill in one respect. Section 1257 of title 28, United States Code, provides for Supreme Court review of decisions 'by the highest court of a State in which a decision may be had.' The evident reason for this language is that under the judicial system of a given State, the highest court to which a litigant can go with his particular case may be a court inferior to the highest court of the State. This may be true also of Puerto Rico and therefore it might be appropriate to substitute the language 'highest court of the Commonwealth of Puerto Rico in which a decision could be had' for the words 'Supreme Court of the Commonwealth of Puerto Rico.'" H. R. Rep. No. 683, p. 4.

The letter did not advise Congress of the existence of the 1958 Puerto Rico discretionary review procedure, nor did it indicate that the problem was anything more than a hypothetical one or that the suggestion made was motivated by more than a lawyer's caution or desire for symmetry. The letter apparently received scanty consideration; the bill went unamended and the House Report was issued on the same date (July 10, 1961) that the letter was sent.[14]

H. R. 7038 then passed both houses without debate.

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[14] The letter was also attached to the Senate Report, issued August 14, 1961. The Senate Report made no comment on the letter other than to say that it agreed with the Department of Justice that enactment of the legislation was appropriate. S. Rep. No. 735, *supra*, pp. 2-3.

Decisions of the Court of Appeals for the First Circuit under Section 1293.

The only thing approaching judicial authority on the question here presented is found in the decisions of the Court of Appeals for the First Circuit with respect to the analogous problem which confronted it during the three-year period between the enactment of Puerto Rico's discretionary review procedure in 1958 and Congress' adoption of Section 1258 in 1961.

In the three cases it decided on this point during this period, the First Circuit did the following:

1. It ruled that, where the only appeal taken was from the judgment of the Puerto Rico Supreme Court denying review, the First Circuit's review was limited to a determination whether the Puerto Rico Supreme Court, in so doing, had abused its discretion.[15]

2. Nonetheless, in each instance it examined the decision of the lower Puerto Rican court, in the light of the record properly before the First Circuit, and concluded that such decision, if tested by the appropriate standard of plenary review, would be upheld.[16]

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[15] *International Basic Economy Corp.* v. *Blanco Lugo*, 267 F. 2d 263 (1st Cir. 1959). The court assumed, *arguendo*, that Section 1293 gave it jurisdiction to review decisions of the highest court in Puerto Rico in which a review could be had, but noted that appellant [unlike the instant petitioner] "had appealed only from the judgment of the Supreme Court and had not sought to appeal directly from the judgment of the Superior Court.

[16] *International Basic Economy Corp.* v. *Blanco Lugo*, 271 F. 2d 437, 439 (1st Cir. 1959), *cert. denied*, 361 U. S. 948 (1960) ("the Superior Court's findings of fact are supported by substantial evidence and cover the essential issues"; appellant failed to "show to our satisfaction that the Superior Court erred in its interpretation and application of established principles of the local statutory and decisional law. . . ."); *Acosta-Marrero* v. *Puerto Rico*, 275 F. 2d 294 (1st Cir. 1960). In the latter case the court did not even refer to the "abuse of discretion" test, but merely noted that the facts were not in dispute and that the principles of law applied by

3. It left open the question as to what course it would follow if an appeal were taken directly from the lower court's decision, after refusal of the Puerto Rico Supreme Court to review.[17]

Conclusion.

The legislative history makes clear what Congress' intent was: to put Puerto Rico on an equal footing with the several states in so far as federal review was concerned. The legislative history further makes clear that Congress had neither the desire nor the intention to create a unique role for Puerto Rico in the federal appellate system, under which the Legislature of Puerto Rico or the Puerto Rico Supreme Court would become the final determinant of this Court's power of review.

Yet if Section 1258 were read to create such special exception to this Court's jurisdiction, precisely this result would follow. The federal right of effective review would be limited, first, by what the Legislature of Puerto Rico chose to place within the local Supreme Court's power of review and, second, by the decision of the Supreme Court of Puerto Rico as to the matters it chose to review; the latter court would thus become the final decision maker as to what federal questions were of sufficient significance to be heard by this Court.

It is submitted that this Court has power to make—as Congress intended it to make—a plenary review of federal

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the Superior Court met applicable review standards. The question was avoided in one further case, *Riera* v. *Riera*, 281 F. 2d 799 (1st Cir. 1960), on the ground that the decision of the Puerto Rico Supreme Court appealed from was not final.

[17] See *International Basic Economy Corp.* v. *Blanco Lugo*, *supra*, n. 15.

questions adjudicated by the inferior Puerto Rican courts, irrespective of whether the Puerto Rico Supreme Court does or does not grant plenary review. This Court may do so either directly, by grant of certiorari to the lower court, or by evaluating the propriety of the Puerto Rico Supreme Court's refusal to review in terms of the correctness of the lower court's adjudication of the federal question.

It is respectfully submitted that the way was pointed out 150 years ago by Chief Justice Marshall in *Durousseau* v. *United States*, 6 Cranch (10 U. S.) 307 (1810), where, because of an apparently ineptly drafted federal statute, a question was raised as to whether the United States Supreme Court had powers of review over a district court in the territory of Orleans. Chief Justice Marshall, speaking for a unanimous Court, ruled that it did:

> "The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.
>
> "'. . . Congress has not expressly made any exceptions [to the appellate jurisdiction of the Supreme Court] . . . It would be repugnant to every principle of sound construction, to imply an exception against the intent.
>
> "This question does not rest on the same principles as if there had been an expressed exception to the jurisdiction of this court, and its power, in this case, was to be implied from the intent of the legislature . . .
>
> "It is believed to be the true intent of the legislature to place those courts precisely on the footing of the court of Kentucky, in every respect, and to subject their judgments, in the same manner, to the revision of the supreme court. Otherwise the court of Orleans would, in fact, be a supreme court . . ." 6 Cranch (10 U. S.) at 314, 318.

Reasons for Granting the Writs.

This case turns upon the policy of this Court against allowing contract-breakers to shield themselves behind the defense of antitrust illegality.

The importance of this policy need hardly here be urged; the Court could give no clearer evidence of its concern than it has by devoting numerous decisions since the passage of the antitrust laws to the formulation and refinement of this policy. Intertwined in this policy are varied, and sometimes conflicting, factors: the necessity for effective enforcement of the antitrust laws; the impropriety of expanding antitrust sanctions beyond those expressly provided by Congress; the reluctance to permit a contract-breaker to escape his obligations; the importance of assuring that every contract action will not be transformed into a mammoth antitrust case; the desirability of federal antitrust questions being adjudicated within the federal court system rather than in the state courts, where contract actions usually arise; the necessity for clear and simple guidelines to the lower courts so that inadvertent infringement of this Court's policy, such as that committed by the court below in the instant litigation, does not occur.

The problem has become more pressing in recent years. With the increasing fluidity of the antitrust laws it has become increasingly easy for a would-be contract-breaker to construct a defense that some clause of his contract violates one of the numerous antitrust laws or, failing that, to urge that, while the contract is valid on its face, with sufficient development of extraneous evidence some part of it may possibly be shown to be violative of one of such laws.

Defendants did not directly question—and could not have questioned—this Court's policy. Instead they argued that that policy was rigorously restricted to suits to recover

the purchase price of goods sold and delivered (74) and that the Court's policy was, in effect, no more than one facet of the contractual doctrine of unjust enrichment (64, 73-74). Where, as here, interposition of the defense permitted a contract-breaker to escape with impunity but did not result in his retaining goods without paying for them as in the purchase-price cases, the Court's policy, the defendants argued, was inapplicable. This purported "distinction" is without merit and squarely conflicts with the view of the Court of Appeals for the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959), a decision relying upon and following *Kelly* v. *Kosuga, supra.* Valid or invalid, this "distinction" may plague the lower courts, unless this Court, upon grant of certiorari, makes clear the actual scope of the defense.

The wisdom of the Court's policy was never better illustrated than it is by this case, with its graphic demonstration of how a contract action can be thrust by an astute defendant into the antitrust morass. Once a defendant has succeeded in persuading a lower court not to strike the defense at the outset, the next move is, inevitably, the initiation of discovery. Characteristically, the evidence relevant to such defense (except in the case of inherently illegal contracts), permits the contract-breaker to demand disclosure of the most intimate details of the plaintiff's business practices, its customers, its volume of sales, the prices it charges and the costs it incurs. A contract claimant may find himself confronted with the impossible choice between handing over such information to an aggressive competitor (sheltered only by the uncertain mercies of a possible protective order) or forgoing legitimate contractual rights.

This technique may be used not merely to evade contractual obligations, but to subvert the antitrust laws themselves. A would-be monopolist could, with impunity, induce

customers or dealers of its competitors to break their agreements with the competitors. If a competitor should sue, the would-be monopolist could invoke in its aid an antitrust defense and demand discovery of the information most useful to it in determining where and when next to strike. Refusal to accommodate this scheme by disclosure of the information would mean dismissal of the action and immunization of the monopolist from legal process—unless the defense could at the outset be stricken on motion.

It may be noted that the very contracts here attacked by Mobil were originally entered into not by petitioner, but by Trinidad, a small independent gasoline marketer. The same tactics used against petitioner could—and may well be—used against small independents, both in Puerto Rico and elsewhere, with even greater efficacy.

I.

The repeated rulings of this Court have made clear that the defense of antitrust illegality is barred wherever the contract sued upon is not intrinsically illegal.

In a long line of cases over a period of fifty years, culminating most recently in *Kelly* v. *Kosuga*, *supra*, the Court has made clear its views of the defense of antitrust illegality.

1. The Court views this defense with marked disfavor as "a very dishonest one."

2. Congress provided exclusive remedies for violations of the antitrust laws; they do not include the interposition of a defense in a contract action.

3. The defense is in no event permissible unless the contract sued upon is "intrinsically illegal."

4. Even in the case of an "intrinsically illegal" contract, the defense will be admitted only where the court is asked by the plaintiff to enforce "the precise conduct made unlawful by the Act."

The Defense is a "Very Dishonest One," Disfavored by This Court.

The line of decisions in which this Court has refused to permit the defense of antitrust illegality in a contract action runs virtually unbroken.[18]

In *Kelly* v. *Kosuga*, this Court stated in what was, if anything, an understatement:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court." 358 U. S. at 518.

The Court referred to "the narrow scope in which the defense is allowed in respect of the Sherman Act," 358 U. S. at 520, and quoted its earlier decision in *McMullen* v. *Hoffman*, 174 U. S. 639, 669 (1899):

> "It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions." 358 U. S. at 519.

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[18] See, *e.g.*, *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1902); *Cincinnati, P.B.S. & P. Packet Co.* v. *Bay*, 200 U. S. 179 (1906); *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 (1915); *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248 (1925); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743 (1947); *Kelly* v. *Kosuga*, 358 U. S. 516 (1959). But see *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909).

See also *Cincinnati P. B. S. & P. Packet Co.* v. *Bay*, 200 U. S. 179, 185 (1906) ("we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such a ground [as illegality under the anti-trust laws]").

Congress Having Provided Exclusive Remedies in an Exclusive Forum for Violation of the Anti-trust Laws, the Defense may not be Used as a "Collateral Method of Enforcement."

Despite this Court's coolness toward the defense, it has repeatedly been urged on the Court that the defense should be permitted as "a collateral method of enforcement of the antitrust laws"[19] supplementing the remedies expressly authorized by Congress. This contention has been uniformly rejected.

In *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 (1915); the Court termed the defense "repugnant to the Anti-Trust Act," stating:

> "the Anti-Trust Act was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same . . . [N]*ot only the prohibitions of the statute, but the remedies which it provided, were co-extensive with such conceptions.*" 236 U. S. at 173-74 (emphasis supplied).

See also *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248 (1925).

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[19] See *Kelly* v. *Kosuga*, *supra*, 358 U. S. at 520; see also *Bruce's Juices, Inc.* v. *American Can Co.*, *supra*, 330 U. S. at 746. ("The argument is made that such a remedy as Bruce seeks here would support the anti-monopoly policy of Congress.")

In *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 755 (1947), the Court noted that *Wilder* had

> ". . . reaffirmed the 'doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes."' "

Bruce's Juices, which concerned a charge of illegality under the Robinson-Patman Act, held specifically that the remedies provided by that Act were exclusive. In answer to the contention that it should "act judicially to add a sanction not provided by Congress," the Court stated:

> "It may be admitted as argued that such a sanction would be an effective enforcement provision. Addressed to Congress, this argument might be persuasive, but the very fact that it would obviously be an effective sanction makes it even more significant that the Act made no provision for it; that no committee dealing with the Robinson-Patman Act proposed it; that not one word suggesting its consideration appears in the debates of Congress; no proponent of the Act pointed out in its favor that it would be self-enforcing because of this sanction; and no opponent pointed with alarm to the consequences of such a drastic sanction on the commerce of the nation."[20] 330 U. S. at 750-51.

The legislative history of the Sherman and Clayton Acts is even more compelling. As to those two acts, there was not merely congressional silence; bills which would explicitly have authorized the defense of antitrust illegality

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[20] The Court also noted that a bill with a lesser sanction had passed the Senate, but not the House.

were considered by Congress, both at the time of adoption of the acts and on numerous other occasions; all such bills were rejected.[21]

In its most recent decision, *Kelly* v. *Kosuga*, *supra*, the Court again confirmed that "the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction." 358 U. S. at 519.

The significance of Congress' refusal to provide for the defense sanction is underscored by its express decision to vest exclusive jurisdiction of antitrust actions in the federal courts. Implicit in such decision is a recognition of the disruption that antitrust cases impose upon a trial court, and the uncertainty whether local state courts could cope with such additional burdens. This factor may be less compelling in the case of a per se violation; it is crucial

[21] Of the twenty-one antitrust bills introduced in Congress in the same month as the original Sherman bill, seven contained sections authorizing this type of defense. Indeed, an analogous provision was in the Sherman bill itself. The Senate expressly voted down an amendment and a substitute bill, each of which contained provisions which would have authorized the defense. See 21 Cong. Rec. 2613-15, 2657-61 (1890). In the years between passage of the two acts, bills seeking to supplement the Sherman Act by including this type of defense were regularly submitted. All died in committee.

When Congress was considering the Clayton bill, it again had before it bills which would have authorized broad application of the defense. See 8 2552, 63d Cong., 1st Sess. (1913).

For the text and history of all bills, see generally Bills and Debates in Congress Relating to Trusts (1903), Sen. Doc. No. 147, 57th Cong., 2d Sess. pp. 411, 422, 433, 435, 437, 441, 452, 465, 481, 515, 549; Bills and Debates in Congress Relating to Trusts, 1902-1913, Prepared for Committee on Judiciary, House of Representatives (1914) pp. 1120, 2101, 2241, 2265, 2419, 2444, 3101, 3117.

in the case of a violation which entails a broadscale economic inquiry.[22]

Unless a Contract is "Intrinsically Illegal" the Defense will not be Permitted.

Cognizant of the Congressional purpose against expansion of antitrust remedies beyond those explicitly provided, the Court has imposed the severest limitations on the pleading of the defense. From the very first the Court has been unequivocal that, to sustain the defense, it was necessary first to find that the contract against which the defense was asserted was "intrinsically illegal" under the antitrust laws.

In *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 252 (1925), the Court ruled:

> "It is only where the invalidity is *inherent* in the contract that the Act may be interposed as a defense. *With that exception* the remedies which the Act provides for violation of it are exclusive." (emphasis supplied).

The Court refused to allow the defense because "it was not shown that the contracts were in themselves invalid under the Anti-Trust Act. . ." *Ibid.*

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[22] See, *e.g.*: *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 329 (1961):

> "To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence."

In *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 172 (1915), the Court noted succinctly that the "case . . . reduces itself to the question whether the contract of sale was inherently illegal. . . ." Defendant there had urged that this threshold requirement was satisfied by clauses in the contract in suit which provided for an

> "offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year, and the clause to the effect that the goods were bought by the Manufacturing Company for its own use, and not for resale." *Id.* at 173.

Defendant's contentions in that case were precisely those made by defendants in this case:

> "that *although such stipulations were intrinsically legal, they become illegal* as the result of the duty to consider them from the point of view that one of the parties was an illegal combination *interested in inserting such conditions as an efficient means of sustaining its continued wrong-doing, and therefore giving power to accomplish the baneful and prohibited results of its illegal organization*;—a duty which, it is urged, results from reason, is commanded by the Anti-Trust Act and the obligation to enforce its provisions, and is required because of a previous decision of this court, enforcing that act (*Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227), unless that decision is to be now qualified or overruled." *Ibid.* (emphasis supplied).

The Court gave short shrift to this argument, that an inherently legal contract can become illegal "by considering . . . the aid to be afforded to [a corporation's] wrongful purposes by the condition which formed a part of the" contract:

> "But, in substance, this only assumes that it was held in the *Continental Wall Paper Case* that that which was inherently legal can be rendered illegal by considering in connection with it *something which there is no right to consider at all.*" 236 U. S. at 177 (emphasis supplied).

Bruce's Juices noted specifically that quantity discounts [like exclusive dealing contracts] are not illegal per se and are not prohibited *in toto*:

> "It is claimed that this [allegedly discriminatory] advantage to quantity buyers renders the quantity discount per se a violation of the Robinson-Patman Act. *To sustain the defense in this case it would be necessary to so hold.*" 330 U. S. at 745 (emphasis supplied).

Since the contract sued upon was not "intrinsically illegal," the defense could not stand. *Id.* at 755.

An essential aspect of this rule has repeatedly been pointed out from the earliest days of its formulation: where a contract is not intrinsically illegal, the defendant may not seek to evade the test laid down by the Court by importing extrinsic evidence.

Unless "in order to prove his own case, a plaintiff proves his violation of law," the defense will not be allowed. *Bruce's Juices* v. *American Can Co.*, *supra*, 330 U. S. at 756. The Court has been particularly critical of efforts of some defendants not merely to go beyond the contract in suit but even to explore into contracts and dealings with persons other than the litigants themselves. Indeed, the type of discovery ordered in the instant case by the Superior Court—petitioner's contracts with third parties, strangers to the action—was the very kind of evidence which, in *Bruce's Juices*, this Court held could not be considered.

> "It is plain that the violation, if there was one, is not inherent in the contract sued upon, . . . but can only be found in different transactions which a party to the litigation had with third persons who are not parties. No such defense has been approved under the Sherman Act . . ." 330 U. S. at 755.

The Court expressly distinguished *McMullen* v. *Hoffman*, 174 U. S. 639 (1899), on the ground that there "Agreements with third persons, not parties to the suit . . . were not relied upon by Court or litigants." 330 U. S. at 756, n. 4. See also *Bromberg* v. *Moul*, 275 F. 2d 574, 578 (2d Cir. 1960) (defense permitted where "unlike Bruce's Juices, we need not look to 'transactions which a party to the litigation had with third persons who are not parties' to prove illegality . . . .").

It is readily apparent why this requirement is essential to the viability of the rule if enforcement of contracts, particularly in the state courts, is not to become enmeshed in the burdensome complexities of antitrust adjudication. In *Bruce's Juices*, this Court noted "the complicated issues" growing out of such an action (330 U. S. at 745) and the fact that the defense of illegality is no efficient shortcut to the vindication of private rights:

> "It is a little dubious whether the sort of remedy [of the defense of illegality] which has been in litigation over four years in this case which Bruce asks us to reverse and send back again, is an antidote for 'protracted and expensive' triple damage suits." *Id.* at 752.

And at the conclusion of its opinion, this Court stressed that:

> "Since the remedy embodied in petitioner's second theory [defense of illegality] would . . . but a weak one-third shadow of the one Congress expressly gave,

we cannot see the need for judicial reduplication in miniature." *Id.* at 757.

Defendant's conduct in seeking extrinsic evidence in support of its supposed defense, and the Superior Court's action in permitting interrogatories for that purpose, are merely confirmatory of the fact that, without such evidence, not even a colorable claim of illegality could possibly be made. And, as shown above, for purposes of determining whether the defense can remain, such evidence cannot be looked to.

The Further Limitation Imposed by *Kelly* v. *Kosuga*.

The limited area in which the defense was permitted by the above cases—where the contract involved was intrinsically illegal—was still further limited by this Court's ruling in *Kelly* v. *Kosuga*, *supra*. In that case, where the underlying contract alleged in the defense was clearly illegal per se, the Court nonetheless refused to permit the defense.

The defense "goes no further," the Court there said, than that allowed in the *Continental Wall Paper*[25] case:

> "The Court [in the *Continental Wall Paper* case] was of opinion that to give judgment for the excessive purchase price so fixed in favor of such a vendor would be to *make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act.*" 358 U. S. at 520. (emphasis supplied)

Unless this test is met, enforcement of a clause is not to be denied, the Court held, "even though it furnished the occasion for a restrictive agreement of the sort here

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[25] *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909).

in question," *i.e.*, a restrictive agreement which was illegal per se. *Id.* at 521.

As a result of *Kelly*, it is now clear that, even with an intrinsically illegal contract, the defense will not be allowed except where "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act . . ." *Id.* at 520.

Only "by treating the defense as so confined" is it possible to avoid "[s]upplying a sanction for the violation of the Act, not in terms provided and capricious in its operation . . ." *Id.* at 521.

II.

The defense is impermissible under the facts of this case.

Under the above authorities, it is apparent that, under the facts of this case, the defense can not be properly interposed and that, in failing to strike the defense, the Superior Court disregarded the clear import of the decisions of this Court.

The Contract Is Not Intrinsically Illegal.

Not even defendants claim that the contract between Texaco and Armaiz is "intrinsically illegal." Whether the exclusive dealing clause is specifically attacked under Section 3 of the Clayton Act or a more diffuse attack is leveled against the contract as a whole under the Sherman Act, it is clear that the contract, by itself, cannot be branded illegal.

Both Congress and this Court have recognized that exclusive dealing arrangements may promote competition

and may in fact be a crucial factor in the continued existence of independent dealers. *Standard Oil of California* v. *United States*, 337 U. S. 293, 306-07 (1949); *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 334 (1961).

The language of the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29, 34, 35 (7th Cir. 1959), which also dealt with a contract containing an exclusive dealing clause, is fully applicable to this case. In striking the defense as a matter of law and refusing to permit a claim of violation of Section 3 to be used by the defendant "as an excuse for avoiding its own contractual obligations," the court stated:

> "We note again that all exclusive dealing contracts are not violative of Section 3 of the Clayton Act. Furthermore, plaintiffs are not asking the Court to enforce the exclusive dealing provision of the agreements. As stated in Kelly *v.* Kosuga, *supra*, 358 U. S. at page 521, 79 S. Ct. at page 432, the contract need not be condemned ' * * * though it furnished the occasion for a restrictive agreement of the sort here in question.' "

Petitioner Does Not Ask the Court to Enforce "The Precise Conduct Made Unlawful by the Act" but a Provision Which the Superior Court Itself Found Valid.

The fact that the contract here involved is not "intrinsically illegal" is dispositive under the cases discussed at pp. 26-30, *supra*, and it is unnecessary to invoke the further limitation implanted by *Kelly* v. *Kosuga*.[24]

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[24] In *Bruce's Juices*, the defense asserted urged that plaintiff was seeking to enforce the precise conduct rendered unlawful by the Robinson-Patman Act, *i.e.*, recovery of discriminatory overcharges. On affirming the striking of this defense, the Court pointed out that the requirement of inherent illegality was not satisfied by the contract there in suit.

Nonetheless, it is clear that the test of *Kelly* furnishes still a further reason why the defense herein must be stricken.

Petitioner's suit is based not on any exclusive dealing clause but on petitioner's contractual right to obtain a lease from Armaiz on the same terms given him by Mobil. Not only is such clause not illegal per se, but, as the court below expressly held, it is legal in and of itself, a conclusion which defendants have never challenged.

Since the option clause—based, as it was, on good and valuable consideration—forms the sole subject matter of this suit, under *Kelly* the question of whether the exclusive dealing provision is legal or not is completely irrevelant to the question of whether the option clause may be enforced.

The Decision of the Superior Court of Puerto Rico Is Patently Erroneous.

The Superior Court of Puerto Rico, while citing the appropriate decisions of this Court, so read them as to achieve precisely the opposite result from that mandated by this Court. Virtually without exception, it substituted for the standards prescribed by this Court standards wholly unrelated and wholly inconsistent.

First and foremost, the Superior Court completely ignored the threshold requirement of inherent illegality. It did so because it believed that it was forced "to *assume* that the defenses *or interrogatories* of defendants would establish that some clauses of the contract illegally restrict commerce." (emphasis supplied) (47). It thus "assumed" the existence of the very requirement which has consistently been held crucial to the availability of this defense.

Further, the Superior Court embraced the very contention which this Court had rejected in every case in which it had been urged: that the defense, despite Congress' failure to provide for it, should be used as a "collateral method of enforcement of the antitrust laws." See pp. 23-26, *supra*. On this point, the Superior Court said:

> ". . . [I]f valid contractual clauses—considered separately—*encourage or promote* the monopolistic purpose of other clauses in the same contract, the defense of illegality under anti-trust laws is permitted. *Continental Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 227 (1909)" (46) (emphasis supplied).

The Superior Court read *Continental Wall Paper* precisely as had the defendant in *Wilder*. In emphatically rejecting this reading of *Continental Wall Paper*, the Court pointed out in *Wilder* that:

> ". . . it is apparent on the face of the opinion in the *Continental Wall Paper Case* that it affords no ground for the extreme and contradictory conclusion thus deduced from it. . . . Since *the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case. . . .*" 236 U. S. at 177 (emphasis supplied).

In *Kelly*, this Court again reaffirmed that the *Wilder* view of *Continental Wall Paper* was the proper and controlling one. 358 U. S. at 520.

Finally, the Superior Court framed the standards, within which it sought to apply the *Kelly* rule, in terms which made the exception swallow up the rule. *Kelly* was cited for the supposed proposition that the defense of

illegality would be stricken "when the eventual judicial determination is unable to correct the allegedly illegal conduct pleaded under antitrust laws" (46). The actual holding in *Kelly* was, of course, that the court will not enforce an agreement where, to do so, would enforce "the precise conduct made unlawful by the Act." Thus, where this Court would bar the defense, except in the one instance where a judgment would otherwise enforce the precise conduct made illegal, the Puerto Rican court would allow the defense in all instances, with one unrelated exception: where the judgment could not serve as a total cure of the illegality.

The gist of this Court's rulings, it is submitted, is that the Court will not permit a defense which, in seeking to put an end to the business of antitrust violations, does so by ending business. See *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 754 (1947). The conversion of contract actions into antitrust marathons—with the attendant endless discovery into the plaintiff's contracts, customers, prices, etc.—would constitute a clog on business far outweighing any marginal benefit. As this Court stated, in *Bruce's Juices*:

> "We do not believe Congress has contemplated so deadly a remedy or has left the way open to us by judicial edict to dislocate business as such a holding would do." 330 U. S. at 754.

Conclusion.

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted

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January 14, 1962.

APPENDIX A.

Opinion of Superior Court of Puerto Rico, Bayamon Part.

IN THE SUPERIOR COURT OF PUERTO RICO,

BAYAMON PART.

TEXACO PUERTO RICO, INC.,
Plaintiff,
v.
JUSTINO V. ARMÁIZ and his wife JOAQUINA GONZÁLEZ and MOBIL OIL CARIBE INC.,
Defendants.

Civil No. CS-80-581
Civil Action

ORDER

This case involves a petition for injunction filed by Texaco Puerto Rico Inc., as assignee of Trinidad Leaseholds (Puerto Rico) Inc., to restrain co-defendants Armáiz-González from leasing to co-defendant Mobil Oil Caribe Inc. a parcel of land having an area of seventy-five hundredths of a cuerda located in the Río Abajo ward of the municipality of Vega Baja.

Plaintiff predicates her cause of action in its alleged preferred contractual right to lease, mortgage or sell the aforesaid property.

Defendants answered challenging the validity of the contract alleging among other defenses that the confract is null because it contains clauses of exclusive sale as well as other clauses violating anti-trust legislation and public order in force in the Commonwealth of Puerto Rico.

Plaintiff moved to strike these defenses and to be dispensed from answering certain interrogatories on the

ground that they are irrelevant. It claims that its preferred option, contained in the contract, constitutes a legitimate, legal, and enforceable contractual right, regardless of the remaining clauses of the contract.

The contract entered into by the parties, in its essential aspects, shows that sometime in 1954 the Armáiz-González spouses, in order to acquire a gasoline station in Vega Baja, bound themselves under a mortgage with Trinidad Leaseholds (Puerto Rico) Inc.—plaintiff's predecessor in interest—for a 10-year period (later enlarged to 15 years). In addition to the mortgage security, the Armáiz-González spouses were required to remain in possession and as owners of the gasoline station; not to utilize it for other purposes than to sell gasoline and petroleum derivatives, while the debt remained outstanding; not to sell in their station any gasoline or substitute thereof other than that sold in Puerto Rico by the mortgage creditor; and "*not to sell, donate, barter, lease, or otherwise alienate or transfer the possession of the mortgaged property during a ten-year period (later extended to 15) . . . without first obtaining the creditor's written consent*". (Parenthesis and emphasis ours.) It was also provided that in case the creditor consented to sell, lease, donate or barter the mortgaged property, it would have first option. It is this option that plaintiff seeks to enforce herein, regardless—as above stated—of whether or not the remaining conditions of the agreement may violate anti-trust laws.

In principle, the plea of illegality under anti-trust legislation has not met with much favor in the courts, notably where the plea has been made to prevent the enforcement of a transaction that is legitimate *per se*, separable and distinguishable from the rest of the allegedly null contract. That is, when the eventual judicial determination is unable to correct the allegedly illegal conduct pleaded under anti-trust laws. *Kelly* v. *Kosuga*, 358 U. S. 516 (1959); *Cincinnati Packet Company* v. *Bay*, 200 U. S. 179 (1906).

Nevertheless, if valid contractual clauses—considered separately—encourage or promote the monopolistic purpose of other clauses in the same contract, the defense of

illegality under anti-trust laws is permitted. *Continental Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 227 (1909).

Is the preferred option clause in the contract in question, valid? If so, could it be upheld regardless of other clauses that violate anti-trust legislation?[1]

In the interpretation of contracts the intention of the contracting parties is fundamental. (Sections 1233-1241, Civil Code of Puerto Rico, 1930 ed.) But to ascertain such intention or will, we must read the contract as a whole and not consider its clauses separately, for otherwise, the true transaction could not be accurately understood.

These directives establish that in the instant case, although the preferred right on which the complaint is grounded, *is valid by itself*, it constitutes a marginal note to the limitations imposed on co-defendants Armáiz-González not to devote their station to other purposes than to sell gasoline and to sell plaintiff's products exclusively, so that plaintiff could keep a sector of our commerce under control.[2]

At this stage of the proceedings it is not known whether or not plaintiff is violating anti-trust laws in force here, but should it eventually be shown that the clause of the contract regarding exclusive distribution is null under the Clayton Act (15 U. S. C. A. §14) and that other of its provisions tend to restrict gasoline commerce in Puerto Rico in violation of the Sherman Act (15 U. S. C. A. §§1 and 2) and their equivalent in our local legislation (10

---

[1] Plaintiff's motion to strike obliges us to *assume* that the defendants' defenses and interrogatories would establish that certain clauses of the contract restrict commerce illegally.

[2] That such was plaintiff's *intention* is corroborated by the circumstance that co-defendants Armáiz-González have been willing to pay the loan in full, and plaintiff has refused. Certainly, pursuant to §1060 of the Civil Code of Puerto Rico, 1930 ed., when a period is for the benefit of the creditor, the latter is entitled to make use thereof, but plaintiff herein—note well—is not a credit company, concerned with more or less interest. It is a dealer of products derived from petroleum. Thus, it is not concerned with collecting the amount of the loan from the Armáiz-González spouses at this time, but with exercising the right of preferred option.

L. P. R. A. (§§251 and 252), the clause of preferred option would have no other scope than to place in the hands of plaintiff the station of the Arnáiz-González spouses, thereby increasing the *illegal control* over the gasoline market in Puerto Rico.

In view of this close interdependence—of purposes, scope, and ends—among the several provisions of the contract that *might* be illegal under anti-trust laws and the clause of preferred option, the enforceability of the latter *necessarily depends* on the eventual determination of the legality of the former. Therefore, the defenses that were challenged must not be stricken and the interrogatories presented by the defendants must be answered within 30 days.

Let this order be notified.

Given in chambers, on this 12th day of April 1961.

San Juan, Puerto Rico.

(s) Rafael L. Ydrach-Yordán,
Superior Judge.

APPENDIX B.

Judgment of Superior Court of Puerto Rico, Bayamon Part.

(TITLE OF THE SUPERIOR COURT OF BAYAMON)

JUDGMENT

Whereas it appears from the record of the case that plaintiff, Texaco Puerto Rico Inc., filed its complaint on May 2, 1960; that on June 29, 1960, defendants filed their answer to that complaint, alleging as a defense that the contract involved in the complaint is unenforceable on the ground of certain alleged anti-trust violations; that on July 1, 1960, defendants served a set of interrogatories on plaintiff seeking information in support of the aforesaid defense; that on July 7, 1960, plaintiff filed a motion to strike the aforesaid defense set up by defendants and an opposition to the interrogatories in support of that defense, basing the motion and the opposition on the ground that neither the defense set up by defendants nor the interrogatories in support of that defense were proper in law, as well as on other grounds set forth in the motion and opposition; that this Court, after a hearing held on August 26, 1960, in connection with said motion and opposition, and after having considered the arguments and briefs submitted, issued an order on April 12, 1961, dismissing the Motion to Strike and the Opposition to the Interrogatories filed by plaintiff; and since it also appears that on April 19, 1961, plaintiff filed a Motion for Reconsideration of the Order of this Court, and later filed in the Supreme Court of Puerto Rico a petition for certiorari to review the actions of this Court, which petition was denied; and that this Court on July 14, 1961, upon defendants' motion, ordered plaintiff to answer defendants' interrogatories within twenty days, and plaintiff has refused to answer said inter-

rogatories on the same grounds set forth and contained in its Motion to Strike and the Opposition to the Interrogatories of July 7, 1960;

THEREFORE this Court enters final judgment dismissing the complaint pursuant to the provisions of Rule 34.4 of the Rules of Civil Procedure of 1958, for plaintiff's failure and refusal to answer said interrogatories. Plaintiff is ordered to pay costs.

Given in Bayamón, P. R., August 11 1961.

Let this Judgment be registered and notified.

(s) WILLIS RAMOS-VÁZQUEZ,
Superior Jud

APPENDIX C.

Judgment of Supreme Court of Puerto Rico.

IN THE SUPREME COURT OF PUERTO RICO.

TEXACO PUERTO RICO, INC., Plaintiff-appellant, *v.* JUSTINO V. ARMÁIZ, *et al.*, Defendants-appellees.	No. 579. Writ of Review.

ORDER

Division composed by Mr. Justice Belaval, as Chief Judge of Division, Mr. Justice Hernández-Matos and Mr. Justice Santana-Becerra.

San Juan, Puerto Rico, October 16, 1961.

The foregoing petition for review is hereby denied.

It was so ordered by the Court as witnesses the signature of the Chief Justice.

(s) LUIS NEGRÓN-FERNÁNDEZ,
Chief Justice.

I attest:

(s) IGNACIO RIVERA,
Secretary.

APPENDIX D.

Defendant's Affirmative Defenses.

SPECIAL DEFENSES.

First Defense: The contract entered into by the Armáiz-González spouses and Texaco Puerto Rico Inc. is null *ab initio* because it violates the anti-trust and public order laws in force in the Commonwealth of Puerto Rico since they result in the undue restriction of free commerce in Puerto Rico or form part of a situation tending thereto.

Second Defense: The eleventh clause of the deed executed by the Armáiz-González spouses and Trinidad Leaseholds (Puerto Rico) Inc. and which Texaco Puerto Rico Inc. seeks to enforce in this action contains certain provisions that make it null insofar as they unduly restrict territorial credit and operate against the laws and public order in force in the Commonwealth of Puerto Rico.

* * * * * * * *

Sixth Defense: If the contract between Texaco Puerto Rico Inc. and the Armáiz-González spouses were construed to be valid, plaintiff lacks a cause of action against the defendants for the reason that the latter was cleared from its obligation with Texaco Puerto Rico Inc. and was free to deal with Mobil Oil Caribe, Inc.

Seventh Defense: The injunction sought by plaintiff does not lie because the latter does not have clean hands and if the writ were issued a situation of facts violating the anti-trust laws in force in Puerto Rico would be perpetuated.

* * * * * * * *

See also Defendant's Opposition to the Petition for Review, October 5, 1961 (62-63):

> "The defendants set up in their answer several defenses based on the fact that the contract between the parties (Exhibits A and B of appellant) violates and is therefore void, the federal and local anti-trust laws and they also submitted an interrogatory [*sic*] and a demand to bring documents so as to produce additional evidence in support of their defenses."

APPENDIX E.

Statutes.

Sherman Act, 26 Stat. 209 (1890), as amended.

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: [Provisos omitted] . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Clayton Act, 38 Stat. 730 (1914).

Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Judicial Code, §1257, 62 Stat. 929 (1948).

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question

on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Judicial Code, §1258, 75 Stat. 417 (1961).

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

Laws, Puerto Rico Ann., Title 4, §37 (Cum. Supp. 1959).

(a) Except as provided in clause (d) of this section, final judgments rendered by the Superior Court in civil cases involving or deciding a substantial constitutional question under the Constitution of the United States or the Constitution of Puerto Rico, and final judgments in criminal cases originated in the Superior Court, shall be appealable to the Supreme Court. The filing of notice of

appeal shall stay all proceedings in the Superior Court with respect to the judgment or part thereof on appeal, or the questions comprised therein, but the Superior Court may proceed with the suit as to any question involved therein not comprised in the appeal, and if the judgment on appeal provides for the sale of goods liable to loss or deterioration, the Superior Court may order that the same be sold and the proceeds of the sale be deposited therein until the Supreme Court shall enter judgment.

(b) Any other final judgment of the Superior Court may, on request of the party aggrieved, be reviewable by the Supreme Court, by way of certiorari issued at the discretion of the court. The filing of a petition for review shall stay all proceedings in the Superior Court with respect to the judgment or part thereof whose review is sought, or the questions comprised therein, until the Supreme Court shall decide the proceeding. However, the Superior Court may proceed with the suit as to any question involved therein not comprised in the review proceedings, and if the judgment on appeal provides for the sale of goods liable to loss or deterioration, the Superior Court may order that the same be sold and the proceeds of the sale be deposited therein until the Supreme Court shall decide the proceeding.

(c) The Supreme Court of Puerto Rico may, in the exercise of its discretion, issue a writ of certification to bring forthwith before it and to hear and resolve any case pending on appeal or review pending before the Superior Court, if it deems that the public importance thereof justifies a deviation from the regular procedure and a direct adjudication by the Supreme Court. The exceptional writ of certification may be issued only on petition of a party, once the records on appeal or review before the Superior Court are filed. The filing of a petition for certification shall not interrupt the proceedings in the Superior Court, but the latter may not enter judgment in the case unless the Supreme Court shall deny the petition for certification.

(d) Judgments rendered by the Superior Court in appeals coming from the District Court and in proceedings for review, based on the record of the proceedings had at the administrative level, or by way of trial de novo, of the rulings, orders or resolutions of administrative organizations, may be reviewed by the Supreme Court by way of certiorari to be issued at its discretion, and not otherwise.

(e) Any decision of the Superior Court may be reviewed by the Supreme Court by way of certiorari to be issued at its discretion, and not otherwise.

(f) The filing of a notice of appeal in a case where only a writ of review is in order shall not be sufficient ground for dismissal, and in such case the notice of appeal shall, for all proper purposes, be considered as if it were a petition for writ of review duly filed in the Supreme Court on the date the notice of appeal was filed in the office of the clerk of the Superior Court. Nor shall the fact that a party has filed a petition for writ of review against a judgment that is appealable be sufficient ground for dismissal; and in such case, the petition for writ of review, shall, for all proper purposes, be considered as if it were a notice of appeal duly filed in the Superior Court.—Amended June 26, 1958, No. 115, p. 279, § 2.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 660

TEXACO PUERTO RICO INC.,
Petitioner,

against

JUSTINO V. ARMAIZ and his wife JOAQUINA GONZALES, and MOBIL OIL CARIBE, INC.,
Respondents.

ON PETITION FOR WRITS OF CERTIORARI

BRIEF FOR RESPONDENTS IN OPPOSITION

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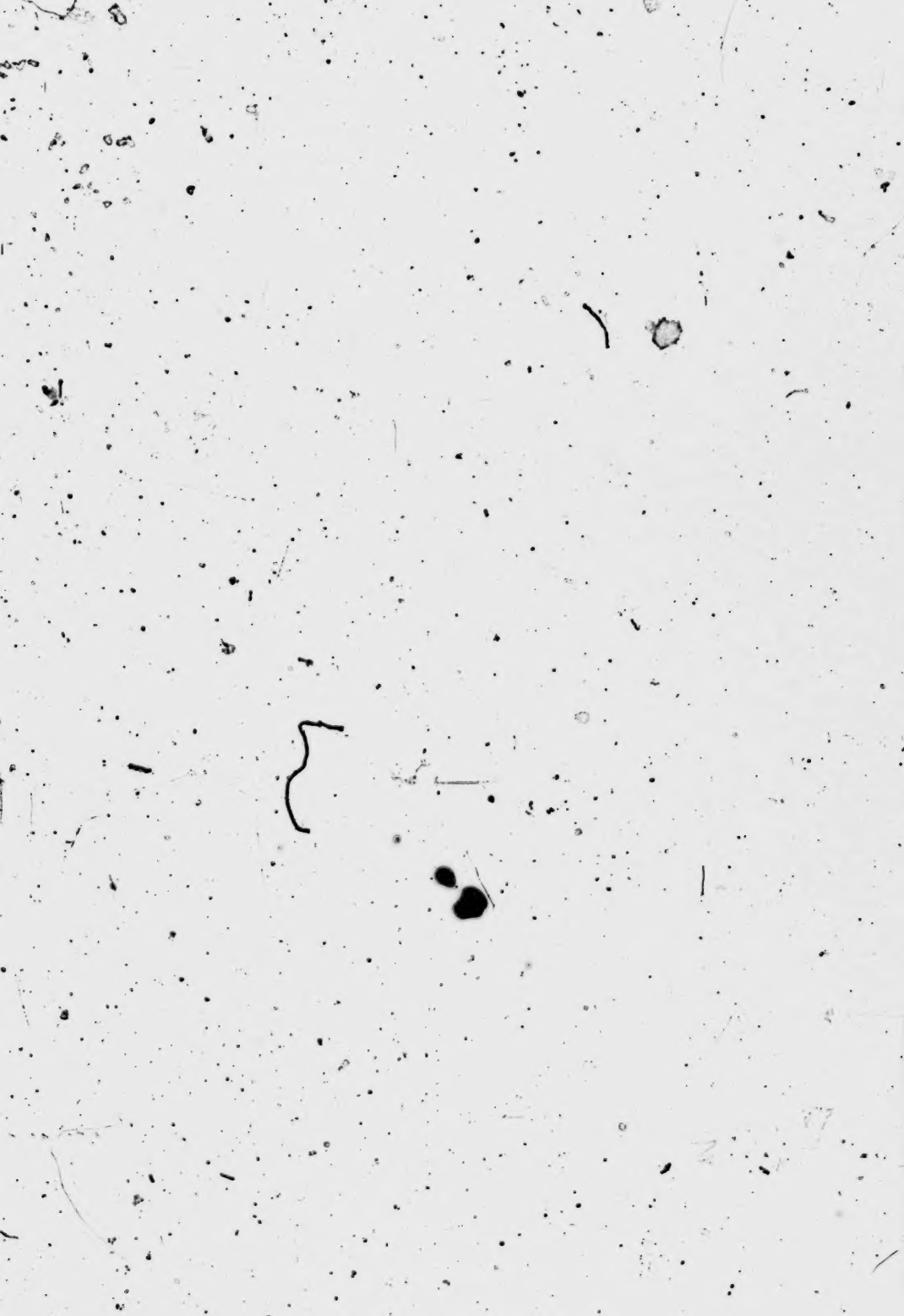

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IN THE

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OCTOBER TERM, 1961

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TEXACO PUERTO RICO INC.,

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ON PETITION FOR WRITS OF CERTIORARI

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinions below are printed as Appendices to the Petition:

Order of Superior Court of Puerto Rico, Bayamon Part ..... Appendix A

Judgment of Superior Court of Puerto Rico ..... Appendix B

Order of Supreme Court of Puerto Rico ..... Appendix C

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1258. Its Petition, however, expressly recognizes that Section 1258 does not, by its provisions, authorize this Court to grant the requested writs of certiorari, but argues that this Section must be so interpreted as to permit such writs. This question of statutory

construction will arise, however, only if this Court concludes that the decisions sought to be reviewed involve controlling questions of federal laws. Section 1258 does not provide for review of the decisions of Puerto Rican courts on questions of local Puerto Rican law.

Questions Presented

1. Whether an important and controlling question of federal law is presented by either:

(a) A judgment of a trial court in Puerto Rico dismissing a complaint for a plaintiff's willful failure to obey that court's order to answer interrogatories relevant to a question of illegality under local Puerto Rican law; or

(b) A judgment of the Supreme Court of Puerto Rico denying a petition for review of the dismissal of the complaint for such willful failure to answer.

2. Whether a judgment entered by the Superior Court of Puerto Rico, which is not the Supreme Court of the Commonwealth of Puerto Rico, may be reviewed by this Court under 28 U.S.C. § 1258.

3. Whether an order of the Supreme Court of Puerto Rico, entered in its discretion pursuant to the Judicial Code of the Commonwealth of Puerto Rico (4 L.P.R. Ann. § 37(b)) denying a petition for review of a judgment may be reviewed by this Court under 28 U.S.C. § 1258.

Statutes Involved

The statutes and the Rules of Procedure pertinent to the Petition are printed in Appendix I hereto as follows:

Antitrust Laws of Puerto Rico, Sections 251 and 252 (10 L.P.R. Ann. §§ 251 and 252);

Judicial Code of Puerto Rico, Section 37(b) (4 L.P.R. Ann. 37(b)):

Judicial Code of the United States, Sections 1257, 1258, and 1293 (28 U.S.C. 1257, 1258 and 1293):

Rules of Civil Procedure of Puerto Rico (1958), Rule 34.4.

Statement

The gist of the complaint is that defendant Mobil Oil Caribe, Inc. ("Mobil") induced defendants, Arnaiz and his wife, to breach a contract with petitioner, Texaco Puerto Rico Inc. ("Texaco"). The complaint seeks an injunction, cancellation of a subsequent contract between Mobil and Arnaiz and a judgment declaring petitioner's option to acquire the properties involved to be valid and enforceable. No claim is made for damages or for unjust enrichment.

The defendants denied substantially all of the allegations of the complaint and set up certain affirmative defenses[1] including the defense that the contract sought to be enforced by plaintiff, Texaco, was illegal and void as violating "the anti-trust and public order laws in force in the Commonwealth of Puerto Rico". As a further defense to the injunction, it was alleged that plaintiff had unclean hands and that to issue such a writ would perpetuate a violation of the antitrust laws in force in Puerto Rico.

Defendants also served interrogatories demanding disclosure of facts designed to support these defenses by showing the dominant share of the Puerto Rican market controlled by Texaco and the extent to which effective

1. The pertinent portions of defendants' affirmative defenses are printed as Appendix D to the Petition.

competition has been foreclosed in this local market by the contract sued on and by Texaco's system of restrictive contracts.

Texaco moved to strike the defendants' affirmative defenses and objected to the interrogatories on the grounds that they were improper in this suit for equitable relief.

After hearing, the Superior Court of Puerto Rico, Bayamon Part, on April 12, 1961, sustained the defendants' affirmative defenses as being sufficient under the local law of Puerto Rico, including the local antitrust statutes of Puerto Rico.[2] The court, applying Puerto Rican law in the interpretation of plaintiff's contract, said in its order, that to enforce plaintiff's contract

> "* * * would have no other scope than to place in the hands of plaintiff the station of the Armaiz-Gonzales spouses, thereby increasing the *illegal control* over the gasoline market in Puerto Rico."

It then concluded:

> "* * * Therefore, the defenses that were challenged must not be stricken and the interrogatories presented by the defendants must be answered within 30 days."

Plaintiff sought to have this interlocutory order reviewed by the Supreme Court of Puerto Rico. Its petition was denied, thereby making the Superior Court's decision the law of the case prior to the trial on the merits.

Texaco failed to answer the interrogatories as ordered. Thereafter, the Superior Court gave Texaco "a final 20

2. 10 L.P.R. Ann. §§ 251 and 252. Printed in Appendix I hereto.
3. Printed as Appendix A to the Petition.

day term to answer * * * under pain of penalties." Plaintiff continued its refusal to answer and, on motion to compel answer or dismiss the complaint the Superior Court entered a judgment dismissing the complaint.[4]

Plaintiff's petition for a review of that judgment by the Supreme Court of Puerto Rico was denied.[5]

This Petition now seeks a writ of certiorari to review the judgment of the Superior Court and the denial by the Supreme Court of Puerto Rico.

ARGUMENT

I

The decision below rests squarely on Puerto Rican procedural and substantive law.

Rule 34.4 of the Rules of Civil Procedure of the Commonwealth of Puerto Rico, specifically provides for a judgment dismissing a complaint for failure to serve answers to interrogatories ordered by the court.[6] The Superior Court, having determined as a matter of law that it would not strike the affirmative defenses of the defendants, had no alternative but to dismiss the complaint in the light of the plaintiff's repeated refusals to comply with its orders. This dismissal has never been challenged by the petitioner as an abuse of discretion. But whether it involved an abuse of discretion or not, a determination of that question would involve the application of the Puerto Rican Rules of Civil Procedure, not any federal question.

4. Printed as Appendix B to the Petition.
5. Printed as Appendix C to the Petition.
6. Printed in Appendix I hereto.

Plaintiff sought review of this dismissal by the Supreme Court of Puerto Rico. As such review is discretionary, plaintiff filed an extensive and detailed Petition for Review. It urged two errors of law:

> *First*, the denial of its motion to strike defendants' affirmative defenses and of its objections to the interrogatories, and
>
> *Second*, the dismissal of the complaint on the ground that plaintiff had refused to answer defendants' interrogatories.

That Petition for Review conceded that the affirmative defenses challenged the validity of the contract sued upon by plaintiff on the ground "that the contract * * * is null *ab initio* because it violates the antitrust laws of the Commonwealth of Puerto Rico." By denying the Petition for Review the Supreme Court left undisturbed the trial court's decision that such defenses were proper under the local Puerto Rican antitrust statutes.

This was the second time that the Supreme Court of Puerto Rico had, in its discretion, left undisturbed the ruling of the Superior Court that the affirmative defenses were valid as a matter of law on a number of grounds, including the local Puerto Rican statutes. Thus, having just had these questions of law decided against it under local Puerto Rican procedure, plaintiff, in effect sought to have the "law of the case" reviewed again by the Supreme Court of Puerto Rico by the simple expedient of repeatedly disobeying the order of the trial court.

This having failed, plaintiff now petitions this Court for review. The possibilities of permitting a litigant to secure interminable re-examinations of questions of sub-

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7. 4 L.P.R. Ann. 37(b). Printed in Appendix I hereto.

stantive law arising at the pleading stage of a case in connection with each step in discovery is repugnant to our entire judicial system and concepts of fair play. This is particularly true when the decision sought to be reviewed involves local court rulings on questions of local procedure and the sufficiency of defenses based on local law.

II

There is no important or controlling question of federal law.

Petitioner insists that, implicit in the judgment of the Superior Court and the denial of review by the Supreme Court of Puerto Rico, there lurks an important and controlling question of federal law. Strangely, when petitioner was trying to induce the Supreme Court of Puerto Rico to grant a discretionary review, petitioner specifically urged the importance of the question presented under the local Puerto Rican antitrust statutes. One must assume plaintiff realized that to obtain a reversal of the decision of the trial court, it had to convince the Supreme Court that the decision was an erroneous interpretation of Puerto Rican statutes.

Petitioner now claims, however, that the decision below is based solely on federal grounds (i.e., an application of the United States antitrust laws). This is directly contrary to what the trial court said and what it did, since it refused to strike the defenses on a number of grounds, including the local Puerto Rican antitrust laws.

This Petition ignores the fact that the judgments sought to be reviewed were based on the dismissal of the complaint resulting from petitioner's contempt of an order

of the Superior Court. Instead, it seeks a review of the sufficiency of the affirmative defenses. These defenses are based not only on the United States antitrust laws but also on the local Puerto Rican antitrust statutes. These Puerto Rican statutes are separate and distinct from the United States antitrust laws. *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937). These defenses have been held by the Superior Court of Puerto Rico in this case to be sufficient as a matter of Puerto Rican substantive law under the local antitrust statutes. The defendants' interrogatories are, and have been held by that Puerto Rican court to be, plainly germane to these defenses. Thus, even assuming *arguendo* that the Superior Court misconstrued the application of the federal antitrust laws, nevertheless, since it also expressly relied on applicable Puerto Rican law, petitioner is not entitled to review by this Court. As this Court stated in *Radio Station WOW v. Johnson*, 326 U.S. 120, 129 (1945):

> "* * * this court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law. 'Where the judgment of the state court rests on two grounds, one involving a federal question and the other not * * *, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.' *Lynch v. New York*, 293 U.S. 52, 54-55."

This principle is particularly applicable when, as here, the petitioner is seeking to thwart a broad application of the Puerto Rican antitrust laws which has been approved by the local courts of Puerto Rico. Even when the Judicial Code provided for review of questions of local Puerto Rican law, this Court consistently recognized the inter-

pretations of Puerto Rican law by the local courts of Puerto Rico as controlling. In *Bonet v. Texas Co.*, 308 U. S. 463, 471 (1940), this Court stated:

> "* * * To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous."

Despite this fundamental rule of law pronounced in *Bonet v. Texas*, petitioner seeks to rely on the specious argument that the federal courts would have construed the Puerto Rican antitrust laws so narrowly as to make this contract valid and enforceable in equity. Suffice it to say the Puerto Rican court on a motion directed to a pleading construed the Puerto Rican statute more broadly.[8] Such a judicial determination of local law must be controlling.

8. The Superior Court held that the defendants were entitled to prove that the necessary effect of the equitable enforcement of the contract was to restrain trade and commerce in Puerto Rico. That court was certainly influenced by the fact that the contract actually was not what it purported to be on its face, i.e., a simple contract of borrow and loan. Indeed it was one where the provisions restraining the borrower were of the essence. It was these restraints which plaintiff was seeking to enforce, for as the court noted the defendants "have been willing to pay the loan in full, and plaintiff has refused." As a result the court gave the defendants the opportunity to defend against a suit for specific performance of this contract both by showing the restraint on competition by this contract standing alone and that this contract was but a part of plaintiff's system of long term contracts having similar restrictive provisions.

Moreover, this is the first case where a court of the Commonwealth has considered affirmative defenses asserted under the local antitrust laws and therefore the local courts are entitled to consider this question on the record after a full trial and not solely upon the pleadings. Otherwise those local statutes cannot be adapted to promote competition in Puerto Rico. There is no reason why these local statutes must be equated to the federal antitrust laws. The courts of the Commonwealth must be permitted to determine the scope of its local antitrust statutes.

Actually all that the court below decided was that the defendants could at the trial of the case, show that plaintiff was not entitled to enforce the contract by equitable means and show that the contract was in furtherance of a monopolistic plan to restrain local competition in Puerto Rico. In effect, the court merely concluded that the efficacy of such affirmative defenses should be left for determination at the trial. Certainly such a decision involves no controlling problem of federal law.

III

Petitioner seeks improperly to invoke the jurisdiction of this Court.

Petitioner is uncertain which judgment of the courts below this Court should review. Consequently it seeks certiorari, under Section 1258 of the Judicial Code, to the judgments of both the Superior Court and the Supreme Court of Puerto Rico. Under this Section the judgment of the Superior Court cannot be reviewed by this Court and, in this case, the judgment of the Supreme Court should not be reviewed.

A. Review of Judgment of the Superior Court of Puerto Rico.

Section 1257 of Title 28 of the United States Code expressly provides that a petition for a writ of certiorari to this Court lies *only* from final judgments or decrees of the Supreme Court of the Commonwealth. This Section does not provide for the direct review of a judgment of the Superior Court of Puerto Rico. In this respect, Section 1258 is the same as Section 1293,[9] which it superseded. Under Section 1293 appeals to the Circuit Court of Appeals for the First Circuit were permitted only from judgments of the Supreme Court of Puerto Rico. Whenever the Supreme Court's action was to deny a petition for discretionary review the only question before the court of appeals was whether there had been an abuse of discretion. *International Basic Economy Corp.* v. *Blanco Lugo*, 267 F. 2d 263 (1st Cir. 1959).

Petitioner bases its request for a review of the Superior Court's judgment on the argument that Section 1258 does not mean what it expressly states. Indeed, petitioner seeks to have this Court completely rewrite this Section by substituting the words "by the highest court of Puerto Rico in which a decision could be had" for "by the Supreme Court of the Commonwealth of Puerto Rico." (Cf. 28 U. S. C. 1257). To justify such a revision petitioner conjectures a "failure of Congress to recognize the effect * * *" of an amendment to the Judicial Code of Puerto Rico which, in a case such as this, made review discretionary. This amendment had been passed by the Legislature of Puerto Rico three years prior to the passage of Section 1258. (4 L.P.R. Ann. 37(b)).[10] Petitioner

[9] §§1257, 1258 and 1293 are printed in Appendix I hereto.

[10] Printed in Appendix I hereto.

offers no basis for its conjecture concerning such a "failure" by Congress. In fact, the Petition itself recites that this provision for discretionary review was referred to on various occasions during the course of Congressional Committee Hearings.

Furthermore, Congress was aware of the difference between Sections 1257 and 1258 for a number of reasons. It had before it the opinion of the Deputy Attorney General of the United States,[11] which stated that Section 1258 related only to review of final judgments or decrees of the Supreme Court of Puerto Rico and was not the equivalent of Section 1257. In addition, the Senate Committee considered whether the enactment of Section 1258 would add a further burden on this Court than already existed as a result of Section 1293. The Senate report concluded that it would not.[12]

Congress, being aware of the differences between Sections 1257 and 1258, determined that only judgments of the Supreme Court of the Commonwealth of Puerto Rico involving federal questions should be reviewed by this Court.[13]

---

11. Letter of Byron R. White, July 10, 1961 prior to the enactment of Section 1258. S. Rep. No. 735, 87th Cong. 1st Sess. pp. 3-4. Petitioner notes that this letter was attached to the Senate report sponsoring the bill. Yet without any basis in fact petitioner now theorizes that "the letter apparently received scanty consideration." Needless to say, no such assumption is warranted.

12. S. Rep. No. 735, 87th Cong. 1st Sess. p. 3 (1961).

13. Congress has specifically provided for direct review by this Court of those rulings of the lower courts of Puerto Rico which it felt should be so reviewed. Thus 28 U.S.C. §1252 provides for such review in certain types of cases, but not in this case. With a special section in the Judicial Code for such direct review of lower court rulings, it seems clear that Congress never intended to provide for review by this Court of all the rulings of the lower courts of Puerto Rico when enacting Section 1258.

Despite the express wording of Section 1258 and the clear Congressional intent to the contrary, petitioner seeks an interpretation of this Section which would subject this Court to a myriad of cases seeking review of decisions of the trial courts of Puerto Rico relating to local discovery procedure. Such an interpretation would permit plaintiffs, in any case where a federal question is claimed, willfully to refuse to comply with orders of a trial court in Puerto Rico to obtain a dismissal of the action and seek review by this Court.

B. Review of Judgment of the Supreme Court of Puerto Rico.

Petitioner also seeks review of the order of the Supreme Court of the Commonwealth of Puerto Rico denying the Petition for Review. The Petition to this Court discloses neither the basis upon which such review is sought nor precisely what petitioner would like this Court to review with respect to the order of the Supreme Court of the Commonwealth.

The Petition conceals that the Circuit Court of Appeals for the First Circuit has always held that an appeal from a judgment of the Supreme Court of Puerto Rico denying review is limited to a determination whether that court had abused its discretion in refusing to review.[14] Assuming, *arguendo*, that in granting or refusing a petition for review the Supreme Court of Puerto Rico exercises a reviewable discretion, it is difficult to see how an abuse of that discretion would be reviewable under Section 1258. At most, the only question that could be raised would be a question of Puerto Rican appellate procedure arising

14. Petition, p. 16.

under the Judicial Code of Puerto Rico. The Petition makes no claim of any abuse of discretion.

In refusing to grant plaintiff's Petition for Review, the Supreme Court of Puerto Rico was merely carrying out its established rule of law that discovery in the Superior Courts of Puerto Rico is solely within the discretion of those courts and will not be reviewed unless there has been an abuse of discretion. That court made its position abundantly clear in *Sierra* v. *Superior Court*, 81 P. R. Rep. 540 (1959). In that case the defendant's interrogatories were sustained by the Superior Court and the Supreme Court of Puerto Rico granted a writ of review. The court in upholding the trial court stated:

> "On appeal or review, our function is limited to deciding whether the Superior Court abused its discretion in rejecting those objections and ordering all the questions in the interrogatory to be answered. It is not up to us to determine the propriety of discovery as if we were a court of first instance. Although it is not beyond the ambit of review, unless it is shown that the lower court lacks a reasonable ground or hinders the substantial rights of a party, the judgment of the trial judge who presided the proceeding should prevail." (pp. 557-8).

Since plaintiff did not claim an abuse of discretion the Supreme Court of Puerto Rico followed the *Sierra* case and denied review. Such a discretionary denial of review is not a question which this Court should undertake to review.

Furthermore, this Court has in the past denied certiorari when it appeared that a denial of review by a

supreme court might have rested on non-federal grounds.[15] Actually there are at least four non-federal grounds on which the denial by the Supreme Court of Puerto Rico might have rested:

(1) an interpretation of the local Puerto Rican antitrust statutes;

(2) the defenses would, if proved, show that the plaintiff had unclean hands;

(3) a rule of local procedural law that the scope of discovery is within the control of the trial court, to be generally reviewed only after trial;[16] and

(4) plaintiff's contract and course of conduct were void as against the Public Order of Puerto Rico.

There being these alternative non-federal grounds, review should not be accorded to petitioner under Section 1258.

C. Plenary review is not warranted.

Petitioner's final argument is that this Court must rewrite Section 1258 or it will be deprived of "corrective power over erroneous adjudications of federal questions by inferior Puerto Rican courts, wherever the Puerto Rico Supreme Court had exercised its discretionary power" and denied review. To support this, petitioner argues that unless rewritten there can be no review by this Court of a constitutional question decided by the

15. *See Stembridge v. Georgia*, 343 U. S. 541, 547 (1952), where this Court stated:

> "At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment."

16. *Sierra v. Superior Court*, 81 P.R. Rep. 540 (1959).

lower courts of Puerto Rico. This argument is unsound. There is an absolute right of appeal to the Supreme Court of Puerto Rico in cases involving constitutional questions, and Section 1258 permits review of that court's judgment. Furthermore if the decision of the Puerto Rican court in this case had rested *solely* on questions of federal law, Section 1258 would permit review. However, in view of the non-federal grounds for decision there is no basis for review.

IV

Petitioner's arguments on the U. S. antitrust laws are not pertinent.

In view of the foregoing, we do not reach any problem under the antitrust laws of the United States. Petitioner's argument on this problem is in reality entirely synthetic and specious. Suffice it to say that in a case in equity a District Court of the United States would, we submit, have reached the same conclusion. This is a suit for an injunction, without any claim for damages or unjust enrichment, to enforce a contract which was one of the means employed to effect an unreasonable restraint of trade. On a motion to strike defendants' antitrust defenses, a district court would have assumed, as a matter of law, that the contract sought to be enforced by specific performance was an integral part of petitioner's plan for monopolization of trade and commerce and indeed, that enforcement thereof would entail a direct violation of Section 7 of the Clayton Act as well as Section 2 of the Sherman Act. It would, accordingly, have denied the motion to strike. The cases cited by petitioner are not

17 4 L.P.R. Ann. §37(a).

in point because they involve efforts by a defendant who, having received benefits under an illegal contract, seeks to avoid paying the plaintiff for the value received. No such situation exists in this case.

CONCLUSION

The petitioner having failed to set forth any basis for review by this Court under Section 1258 of the Judicial Code, the Petition for Writs of Certiorari should be denied.

March 14, 1962

Respectfully submitted,

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APPENDIX I

Antitrust Laws of Puerto Rico, Sections 251 and 252 (10 L.P.R. Ann. §§251 and 252)

251. Contracts in restraint of trade

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of Puerto Rico is hereby declared to be illegal. Every person who shall make any such contract or engage in any such conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments in the discretion of the court. Mar. 14, 1907, p. 328, 1. eff. May 1, 1907.

252. Monopolies; penalty

Every person who shall monopolize or attempt to monopolize or combine or attempt to combine with any other person or persons to monopolize any part of the trade or commerce in any town of Puerto Rico or between the towns thereof shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding five thousand dollars, or by imprisonment, not exceeding one year, or by both such punishments, in the discretion of the court. Mar. 14, 1907, p. 328, §2 eff. May 1, 1907.

Judicial Code of Puerto Rico, Section 37(b) (4 L.P.R. Ann. §37(b))

37. Review of Rulings of Court of First Instance

(b) Any other final judgment of the Superior Court may, on request of the party aggrieved, be reviewable by

the Supreme Court, by way of certiorari issued at the discretion of the court. The filing of a petition for review shall stay all proceedings in the Superior Court with respect to the judgment or part thereof whose review is sought, or the questions comprised therein, until the Supreme Court shall decide the proceeding. However, the Superior Court may proceed with the suit as to any question involved therein not comprised in the review proceedings, and if the judgment on appeal provides for the sale of goods liable to loss or deterioration, the Superior Court may order that the same be sold and the proceeds of the sale be deposited therein until the Supreme Court shall decide the proceeding.

Judicial Code of the United States, Sections 1257, 1258 and 1293 (28 U.S.C. §§1257, 1258 and 1293)

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution,

treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

1258. Supreme Court of Puerto Rico; appeals, certiorari

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States. Added Pub. L. 87-189, §1, Aug. 30, 1961, 75 Stat. 417.

1293. Final decisions of Puerto Rico and Hawaii Supreme Courts

(Repealed. Pub. L. 87-189, §3, Aug. 30, 1961, 75 Stat. 417)

The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions

of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs. June 25, 1948, c. 646, 62 Stat. 929.

Rules of Civil Procedure of Puerto Rico (1958), Rule 34.4.

Rule 34.4. Failure of party to attend or serve answers.

If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 30 after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

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Supreme Court of the United States

October Term, 1961.

TEXACO PUERTO RICO INC.,

Petitioner,

vs.

JUSTINO V. ARMAIZ and his wife JOAQUINA GONZALEZ, and MOBIL OIL CARIBE, INC.,

Respondents.

PETITIONER'S REPLY BRIEF.

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JUSTINO V. ARMAIZ and his wife JOAQUINA GONZALEZ, and MOBIL OIL CARIBE, INC.,

Respondents.

PETITIONER'S REPLY BRIEF.

I.

The decision of the lower court was based solely upon the erroneous conclusion that the affirmative defenses were proper under federal law.

In their efforts to forestall a decision on the merits by this Court, respondents place their major reliance on the contention—made in the teeth of the record and of respondents' prior contentions to the contrary—that the decision below involved nothing more than a question of local Puerto Rican law, substantive or procedural.

Respondents sprinkle their brief with unqualified statements that the complaint was dismissed for a failure "to answer interrogatories relevant to a question of illegality *under local Puerto Rican law*". (Respondents' Brief, p. 2), that "the trial court's decision [was] that such defenses were proper *under the local Puerto Rican antitrust stat-*

utes" (*id.* at 6), that the defenses were held by the Superior Court "to be sufficient *as a matter of Puerto Rican substantive law under the local antitrust statutes.*" *Id.* at 8. (emphasis supplied)

The frequency and certainty with which these assertions are made should not be permitted to obscure the fact that they are wholly erroneous.

No question of local law was adjudicated by the Superior Court. It is unarguable, as pointed out by both petitioner and respondents, that respondents' answer in this litigation raised *defenses* under both federal law and the local Puerto Rican law.[1] It is equally unarguable, however, that only federal cases were urged upon the court by the respondents and that the Superior Court, in reaching its *decision*, examined only federal precedents and neither considered nor adjudicated questions of local law. This important distinction should not be permitted to be obscured by respondents' constant shifting back and forth between discussion of the "defenses" and discussion of the "decision".

It is too late in the day for respondents now to decide that they would have been better advised to urge the lower court to sustain the defenses on the basis of local, rather than federal, law. What cannot now be gainsaid is that the issue was briefed and argued by both sides to the lower court entirely on the basis of the federal judicial authorities; the court in its decision cited only such authorities.[2]

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[1] *See, e.g.*, Respondents' Brief, p. 8; Defendants' Opposition to the Petition for Review, October 5, 1961 (62-63).

[2] Two further explanations exist for the court's reliance on the federal, rather than the local, aspects of the defenses. A major basis of respondents' attack was Section 3 of the Clayton Act [erroneously cited in Respondents' Brief as Section 7, see Respondents' Brief, p. 16], which has no local law counterpart; in addition, the local law had never before been construed to permit the interposition of antitrust defenses in contract actions. *See* Respondents' Brief, p. 10.

Since the affirmative defenses were sustainable upon a finding of propriety under either federal or local antitrust laws, once a determination of propriety had been made under one, it was unnecessary for the court to enter upon an examination of the other. Nor did the court do so. At no time did it make any independent determination whatever under local law, writing it off in its single reference as merely the "equivalent" of the federal law. This is not a question open to dispute; it can readily be resolved by consulting the opinion of the lower court itself, printed as Appendix A to the Petition.

Respondent's only response is that "There is no reason why these local [antitrust] statutes must be equated to the federal antitrust laws". Respondents' Brief, p. 10. Respondents are wrong on two counts. First, whether or not there is such a reason, the plain fact is that the court did in fact so equate the local law. Second, the reason for such equation does exist: in Puerto Rico, the federal antitrust laws apply internally to *intrastate* commerce. See 48 U. S. C. 734 (continued by Compact, 48 U. S. C. 731e.). A Puerto Rico court is therefore more restricted than is a state court in the extent to which it can construe the local law differently from federal law. Where federal law does not permit antitrust defenses because they would clog the commerce subject to the federal laws, it is hardly likely that a local Puerto Rican court could authorize such a clog upon the same commerce.

One further argument advanced by respondents cannot be passed over without comment. Respondents make much of a purported concession by petitioner before the Puerto Rico Supreme Court that the affirmative defenses raised only issues under "the antitrust laws of the Commonwealth of Puerto Rico." Respondents' Brief, p. 6. Respondents state with some asperity, that:

> "Strangely, when petitioner was trying to induce the Supreme Court of Puerto Rico to grant a discretionary review, petitioner specifically urged the importance of the question presented under the local Puerto Rican antitrust statutes. One must assume plaintiff realized that to obtain a reversal of the decision of the trial court, it had to convince the Supreme Court that the decision was an erroneous interpretation of Puerto Rican statutes" *Id.* at 7.

If respondents had made the most casual check, they would have recognized that this purported concession was in actuality no more than a translator's error, that petitioner's papers used precisely the words of respondents' affirmative defenses ("las leyes contra monopolios vigentes en el Estado Libro Asociado de Puerto Rico"), which were properly translated in the affirmative defenses as the antitrust laws "in force" in Puerto Rico (29)—a locution which respondents themselves concede refers to the federal antitrust laws as well.

The foregoing reasons render it totally unreasonable to believe that the lower court was basing its decision upon a new and independent interpretation of the local antitrust statute rather than upon its reading of federal law. That an election was available to the court to base its decision on local law instead is immaterial. The short answer is that it did not. As this Court stated in *St Louis, Iron Mountain & Southern Ry.* v. *McWhirter*, 229 U. S. 265, 276 (1913):

> "Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect. But it was long since pointed out . . . that to admit that the authority to review the

> action of a state court where it has decided a Federal question can be rendered unavailing by a suggestion 'that the court below may have rested its judgment' on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion."

Indeed, even if the affirmative defenses had been based entirely upon the local antitrust laws (as is concededly not the case), by viewing such laws as "equivalent" to federal law, by grounding its decision solely upon its reading of the decisions of this Court and by failing to "declare its independence of the decisions of this Court," the decision would still present a federal question. See *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 556 (1940); *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481 (1942); *State Tax Commission of Utah* v. *Van Cott*, 306 U. S. 511 (1939).

II.

The right to review a court order wrongly adjudicating a federal question is preserved—not lost—by refusing to comply with such order.

Respondents further attempt to muddy the waters by asserting that, even if the lower court's initial order—which refused to strike the antitrust defenses and directed petitioner to answer interrogatories predicated on such supposed defenses—wrongly adjudicated federal law, petitioner's right to review that order has somehow been lost by petitioner's failure to comply with it and by the consequent final judgment dismissing petitioner's complaint by reason of such failure. Respondents' apparent premise is that, where a local procedural rule provides for dis-

missal of a complaint for failure to comply with an order, a litigant has no alternative but to comply, regardless of how erroneous the order may be under federal law.

This contention is wholly untenable. Refusal to comply with an improper order is the traditional method for securing its review. See, *e.g.*, *Hickman* v. *Taylor*, 329 U. S. 495 (1947); *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958). And necessarily so. If a litigant could preserve his right of review in this Court only by complying with an erroneous state order, a lower state court would be able to command absolute compliance with the most outrageous interlocutory orders. A litigant would be thrust into the grotesque position where the only way he could preserve his right of review would be by suffering the very injury which he sought review in order to avoid.

The absurdity of such a contention could not be more graphically demonstrated than it is by the facts of this case. Under respondents' theory, the improper interposition of a federal antitrust defense would necessarily mean—if a lower court erroneously refused to strike it at the very outset—that the litigant would be dragged endlessly through the labyrinth of antitrust discovery, powerless to test the propriety of the order even by nonsuit. The litigant's plight would be even further aggravated where compliance required the litigant to turn over to an aggressive competitor the most sensitive competitive information. Far more is involved than—as respondents would have this Court believe—the dry legal question of a court's deferring the time for passing upon affirmative defenses.[3] At stake is

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[3] "In effect, the court merely concluded that the efficacy of such affirmative defenses should be left for determination at the trial. Certainly such a decision involves no controlling problem of federal law." Respondents' Brief, p. 10.

the right of a litigant to some effective avenue of review to correct an erroneous and oppressive order.

Equally a victim of respondents' theory would be the very federal policy which led to the rule of this Court against antitrust defenses in contract actions. This policy is squarely based upon the recognition that contractual obligations are effectively nullified if ordinary contract actions are permitted to be converted by astute defendants into mammoth antitrust marathons. This consideration is of particular force in the case of actions in the state courts, where contract actions usually arise, and which are less likely to reach resolutions consistent with federal policy, as this very case demonstrates.

This Court's limitation of the defense to "intrinsically illegal" contracts is patently designed to avoid precisely this result. It is of the essence of this Court's policy that such defenses be stricken *in limine*, and the cases have characteristically arisen, as has this one, on motions to strike the antitrust defense prior to the commencement of discovery appurtenant to it.[4]

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[4] See, *e.g.*, *Kelly* v. *Kosuga*, 358 U. S. 516 (1959); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743 (1947); *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248 (1925); *D. E. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 (1915). In each of the foregoing cases, the Court affirmed the granting of motions to strike antitrust defenses or the sustaining of demurrers to such defenses. *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909), where the defense was sustained, reached the Court after a demurrer to the defense had been overruled and the plaintiff, rather than proceeding further, allowed judgment to be entered dismissing its action to enable it to test the propriety of the defense.

III.

This Court is not barred from review of erroneous federal-question decisions of the lower Puerto Rican courts.

In its petition, petitioner noted that an overliteral construction of Section 1258 would deprive not merely this Court, but the entire federal court system, of any corrective power over erroneous adjudications of federal questions by inferior Puerto Rican courts, wherever the Puerto Rico Supreme Court had failed to review. The inferior Puerto Rican courts, petitioner noted, would thus become the final arbiter of the most intricate questions of federal policy—a distinction which they alone would possess among all state and federal courts.

Respondents in their brief, argue for precisely this absurd result. Respondents' position, pure and simple, is that wherever review of a decision of a lower Puerto Rican court is refused by the Puerto Rican Supreme Court, such decision is forever placed beyond the review power of this Court, however erroneous that decision might be and however important the federal policy which the lower court overrode.

Respondents reach this result in two short steps. First, under Section 1258, according to respondents, certiorari "lies *only* from final judgments or decrees of the Supreme Court of the Commonwealth" (Respondents' Brief, p. 11) (emphasis in original); any possibility of direct review by this Court of decisions of the lower Puerto Rican courts is thus eliminated.

Second, respondents regard review of the Puerto Rico Supreme Court's action as equally forbidden. The Puerto Rico court's refusal to review is, in respondents' eyes, a

nonreviewable question of discretion; even if it were reviewable on this ground, it would still be nonreviewable wherever it "*might* have rested on nonfederal grounds." Respondents' Brief, p. 15 (emphasis supplied). Since refusal to review can always be ascribed to a wide variety of unstated grounds, including such things as calendar congestion, respondents' analysis effectively eliminates as well this last avenue of review by this Court.[5]

The chief significance of respondents' brief lies in what it does not say: It cannot change the demonstrated fact that Congress' intent was precisely contrary to the position here taken by respondents,[6] that Congress, far from seeking to oust this Court of jurisdiction comparable to that which it has always enjoyed over federal question decisions of the several states, explicitly sought instead to confer such jurisdiction upon it and to place Puerto Rico on an equal footing with the States. See Petition, pp. 10-15.

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[5] Contrary to respondents' assertion, petitioner nowhere contended that constitutional questions decided by the lower Puerto Rican courts were nonreviewable. See Respondents' Brief, pp. 15-16. Respondents, however, can derive little comfort from the fact that, under existing Puerto Rico statutes, constitutional questions are appealable as of right to the Puerto Rico Supreme Court. Constitutional questions are, of course, far from the only questions of major significance to the rights of individuals and to national policies. And under respondents' reading of Section 1258, this provision could be repealed by the Puerto Rico Legislature tomorrow and thereby oust this Court of jurisdiction to review even such questions.

[6] About the only comment made by respondents with respect to Congressional intent is their statement at p. 12, n. 13, that "Congress has specifically provided for direct review by this Court of those rulings of the lower courts of Puerto Rico which it felt should be so reviewed." The section referred to, Section 1254, was not, of course, directed particularly to Puerto Rico, but applies equally to all United States courts and permits direct review of all decisions invalidating acts of Congress in actions in which the United States is a party. Respondents' reference to this "special section in the Judicial Code" as though it were an example of special Congressional provision for review of decisions of lower Puerto Rican courts is quite misleading.

It is respectfully submitted that it would be a travesty to deprive this Court of jurisdiction in the guise of obedience to a legislative mandate, where the mandate is, unarguably, precisely to the contrary.

IV.

Respondents' avoidance of the merits.

With understandable restraint, respondents say scarcely a word in defense of the substance of the decision of the Puerto Rico Superior Court, burying in a single paragraph at the very end of their brief their entire discussion of the major issue herein: the lower court's flagrant disregard of this Court's policy against interposition of antitrust defenses in contract actions.

Respondents' only comment is to express their personal confidence that a District Court of the United States would reach the same result, since this was an injunction action, rather than a case of "unjust enrichment"—a confidence which would seem singularly misplaced in view of the fact that the Seventh Circuit, in recently passing upon this purported distinction, reached a result precisely contrary to that urged in respondents' brief: *Beloit Culligan Soft Water Service, Inc. v. Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959). See also *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248 (1925) (sustaining a demurrer to an antitrust defense although defendant had not been unjustly enriched.)

One final conclusion may be in order: if counsel can, with apparent seriousness, assert that this Court's long-enunciated policy is limited *solely* to cases of unjust enrichment and can express the opinion that a District Court would so hold, then this fact would seem to furnish strong additional evidence that this Court should grant certiorari to settle, one way or another, for the benefit of the bar and the lower

federal and state courts, whether such distinction in fact exists.

Conclusion.

Respondents' tactics in their brief in opposition seem clear: to evade the substantive issue tendered to this Court and, instead, to try to raise a sufficient fog of doubt as to the existence of an issue of local law to cause certiorari to be denied.

It is respectfully submitted that these efforts of respondents cannot be permitted to becloud the basic and nationally significant issue tendered by this case to this Court. The decision below was squarely based upon a federal question, not an independent local ground; this Court has jurisdiction to review it; the questions presented are of such importance that review is called for.

For the foregoing reasons, the petition for writs of certiorari should be granted.

Respectfully submitted,

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